

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
*See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24*

**FILED BY CLERK**  
**NOV 29 2010**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2010-0116
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JOSHUA WADE KOSATSCHENKO,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

---

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092605-001

Honorable Christopher C. Browning, Judge

AFFIRMED

---

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Kathryn A. Damstra

Tucson  
Attorneys for Appellee

Barton & Storts, P.C.  
By Brick P. Storts, III

Tucson  
Attorneys for Appellant

---

ESPINOSA, Judge.

¶1 After a bench trial, Joshua Kosatschenko was convicted of being a prohibited possessor in possession of a deadly weapon. The trial court suspended the

imposition of sentence and placed him on probation for a four-year term. On appeal, he contends the court misapplied the law to the facts in rejecting his affirmative defense of entrapment by estoppel. Finding no error, we affirm.

### **Factual and Procedural History**

¶2 We view the evidence, and all reasonable inferences from that evidence, in the light most favorable to upholding Kosatschenko's conviction. *See State v. Pierce*, 223 Ariz. 570, n.2, 225 P.3d 1146, 1146 n.2 (App. 2010). In 2003, when he was thirteen years old, Kosatschenko was adjudicated delinquent after pleading guilty to two counts of aggravated assault with a deadly weapon or dangerous instrument. As a result of that adjudication, he was placed on probation and was forbidden to possess a firearm. He completed probation and, days after his eighteenth birthday, filed an application with the juvenile court requesting the restoration of his civil rights, specifically requesting the restoration of his right to possess a firearm. His petition was denied.<sup>1</sup>

¶3 Several months later, Kosatschenko applied for a position as a security guard with a private security firm. On the application form, he responded "no" to questions asking whether he had ever been convicted of a crime or had ever been on probation. The private security firm thereafter submitted on his behalf an application to the Arizona Department of Public Safety (DPS) requesting Kosatschenko's certification as an armed security guard. Pursuant to DPS protocol and, having no indication that Kosatschenko had ever been adjudicated delinquent or been placed on probation, DPS

---

<sup>1</sup>Under A.R.S. § 13-912.01(C), a juvenile adjudicated delinquent for a dangerous nature offense is not entitled to the restoration of the right to carry a firearm until his or her thirtieth birthday.

searched only adult criminal record files. It then qualified him for service as an armed guard. Approximately six weeks later, while on duty at a convenience store, Kosatschenko fired his weapon at a shoplifter and was later indicted based on his prohibited possessor status. He was convicted and sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

### **Discussion**

¶4 On appeal, Kosatschenko contends the trial court misapplied the law to the facts when it rejected his defense of entrapment by estoppel. As the court correctly noted, entrapment by estoppel is not a statutorily recognized defense in Arizona, nor has it been created or recognized by common law. But, like the trial court, we conclude we have no obligation to determine whether it is a valid defense because even assuming it is, the court did not abuse its discretion when it found Kosatschenko had not proven the elements of this defense by a preponderance of the evidence. *See* A.R.S. § 13-205(A) (defendant's burden to prove affirmative defenses by preponderance of evidence).

¶5 In jurisdictions that recognize it, entrapment by estoppel is a defense to a crime when the defendant proves that an authorized government official who was empowered to give advice, and who was made aware of all relevant historical facts, affirmatively advised the defendant that the charged prohibited conduct was permissible, and the defendant reasonably relied on the incorrect information. *See United States v. Batterjee*, 361 F.3d 1210, 1216-17 (9th Cir. 2004); *see also United States v. Kieffer*, 621 F.3d 825, 833 (8th Cir. 2010); *United States v. Lovern*, 590 F.3d 1095, 1104 (10th Cir.

2009); *United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009), *cert. denied*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 655 (2009); *United States v. Giffen*, 473 F.3d 30, 39 (2d Cir. 2006); *United States v. Sousa*, 468 F.3d 42, 46 (1st Cir. 2006); *United States v. Triana*, 468 F.3d 308, 316 (6th Cir. 2006). Here, the trial court found that Kosatschenko had failed to establish two of these elements. Specifically, it concluded the evidence presented at trial indicated the government had not been made aware of all the relevant facts and that any reliance Kosatschenko had placed on DPS's issuing him a license was not reasonable.

¶6 Based on the record, we conclude the trial court was well within its discretion in making these findings. At trial, a DPS administrative supervisor testified that the department routinely checks an applicant's adult criminal record but relies on the applicant to disclose relevant facts that would not be uncovered by the criminal record check, further adding that information about a juvenile record would "send up red flags." Here, neither Kosatschenko nor the private agency that employed him submitted any additional information to DPS. Accordingly, the court readily could find that Kosatschenko failed to prove by a preponderance of the evidence that DPS was acting with full knowledge of the relevant historical facts, thus barring this affirmative defense. *See Batterjee*, 361 F.3d at 1216.

¶7 To the extent Kosatschenko implies he should not be barred from asserting this defense because he was not responsible for DPS's lack of knowledge, we reject this suggestion. Not only has he failed to present any authority for his implicit assumption that because he did not personally misinform DPS, he should be excused from proving

this element, he was, in fact, the source of DPS's misinformation. Kosatschenko affirmatively indicated on his employment application that he had neither been convicted of a crime nor ever had been placed on probation. Although a finding of delinquency is distinct from a conviction, *see In re Casey G.*, 223 Ariz. 519, ¶ 5, 224 P.3d 1016, 1017 (App. 2010), making his first affirmation technically truthful, Kosatschenko had been on probation and, indeed, testified he was aware of this. But for this falsehood, the security firm would have had reason to investigate the circumstances of the probation and to submit to DPS more complete and accurate information about his eligibility to become an armed guard.<sup>2</sup>

¶8 The trial court also was well within its discretion when it found Kosatschenko's reliance on DPS's authorization unreasonable. For the purposes of entrapment by estoppel, reliance is reasonable if "a person sincerely desirous of obeying the law would have accepted the information as true." *United States v. Corso*, 20 F.3d 521, 528 (2d Cir. 1994), *quoting United States v. Weitzenhoff*, 1 F.3d 1523, 1534 (9th Cir. 1993). As the court found, Kosatschenko's application for the reinstatement of his right to possess a weapon just days after his eighteenth birthday both belies his claim that he did not understand his prohibited possessor status survived into adulthood and it

---

<sup>2</sup>Kosatschenko testified he had spoken "briefly" about his juvenile record with one of the supervisors at the security firm prior to the submission of his application. This testimony was not corroborated nor did Kosatschenko provide details of what was discussed. Accordingly, the trial court was free to disregard this testimony and conclude the security firm had no knowledge of his past. *See State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007) (fact finder judges credibility of witnesses). Furthermore, the government agent's knowledge of all facts is the required element, regardless of from where any misinformation came.

discredited his testimony that he was unaware he was a prohibited possessor. *See State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007) (credibility of witnesses within purview of fact finder). Finally, the fact he had lied on his employment application shows Kosatschenko knew he was not allowed to have a firearm. Under these circumstances, we conclude the trial court had ample reason to find Kosatschenko was aware of his prohibited possessor status and would not have accepted DPS's authorization as valid had he been "sincerely desirous of obeying the law." *Corso*, 20 F.3d at 528, quoting *Weitzenhoff*, 1 F.3d at 1534.

**Disposition**

¶9 Kosatschenko's conviction and probationary term are affirmed.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge